

## PRACTICE NOTE

## LA PRATIQUE EN BREF

**Vous pensez qu'un tribunal chinois est vraiment un « tribunal » ?**

Quand je discute de « la primauté du droit en Chine », je me souviens de l'histoire de l'élève de troisième année à qui l'on demandait, dans un examen de français, de définir le mot *farfadet*. Il répondit qu'un farfadet « était semblable aux fées, aux lutins et autres créatures mythiques ».

De la même façon, la « primauté du droit » en Chine relève de la mythologie. Elle existe seulement dans l'esprit de Paul Martin et d'autres politiciens et politiciennes occidentaux qui s'imaginent qu'il suffit de souhaiter une chose pour qu'elle existe vraiment.

Mais on reparlera une autre fois plus en détail de la « primauté du droit » en Chine. Pour les fins de cet article, contentons-nous d'affirmer que tout investisseur étranger ayant l'intention d'investir directement en Chine en supposant qu'il y existe un système de justice fonctionnel pour protéger son investissement le fait à ses risques et périls.

Un joueur étranger qui accède au marché chinois sur une base contractuelle pour la première fois n'a pas vraiment de choix rationnel en ce qui a trait au règlement de différends

## So, You Think A Chinese Court is a “Court”?

*Clive M. Ansley\**

Whenever I discuss the “Rule of Law in China”, I am reminded of the little third grade boy who was asked on an English examination to define “leprechaun”. He wrote that “leprechauns are similar to fairies, elves, virgins, and other mythical creatures.”

Similarly, the “Rule of Law” in China is also the stuff of mythology. It exists only in the minds of Paul Martin and assorted other Western politicians labouring under the delusion that if they wish it so, and say it is so, then it will become so.

More on the general topic of “Rule of Law” in China, in another article. But for our purposes, the point to be made here is that any foreign investor contemplating direct investment in China on the assumption that there is a functioning legal system in place to protect his/her investment acts at his peril, influenced by a serious misconception.

### Arbitration Clauses: Avoiding the Disaster of Appearing in a Chinese “Court”

A foreign player entering the Chinese market on a contractual basis for the first time has two choices,

insofar as disputes arising under his contract are concerned. When it comes to the dispute resolution clause in the contract, there is absolutely no rational choice whatever, as between allowing the matter to go before a Chinese “court” on the one hand, or opting for arbitration on the other hand. Without exception, every foreign joint venturer who has obtained competent legal advice will insist on the insertion of an arbitration clause in the contract. On no account will the “savvy” foreign player ever voluntarily come within a thousand miles of a Chinese “court”.

The two choices for dispute resolution are: arbitration by a Chinese arbitration body, or arbitration abroad. In my view (and this is the advice I gave all my foreign investor clients over a period of fourteen years of practice in China), this choice should always be exercised in favour of a foreign arbitration clause. I personally favoured the Stockholm Chamber of Commerce, though the ICC, AAA, or any of several other popular alternatives would be acceptable. I have always advised that insistence by the Chinese party on arbitration in China should be treated as a “deal-breaker”.

The reasons for this, however, are somewhat ironic and take most clients by surprise. It is not because “everything in China is corrupt” and the Chinese arbitrators are as corrupt as are the Chinese “courts”. In fact, they are not. Although some foreign lawyers specializing in Chinese legal matters have somewhat soured on practices of the China International Economic and Trade Arbitration Commission (“CIETAC”),<sup>1</sup> in recent years, the overall record of arbitrations before this body is quite good. The competence of CIETAC’s panel of arbitrators is very high and their awards have generally commanded respect. Moreover, if a foreign party is nervous about impartiality, he/she may choose a foreign arbitrator from among those on the CIETAC panel.

Quite aside from the *pros* or *cons* of resolving disputes in “courts” or before a panel of arbitrators, the fact is that no client really wants to do either, if there is any way the process can be avoided. Every business person prefers to settle disputes amicably through negotiation, if this is an option.

The first irony is found in the fact that I have more faith in the genuine impartiality of Chinese arbitrators than do most of the Chinese parties with whom I negotiated over the years on behalf of foreign investors. The Chinese parties typically assumed, incorrectly, that a Chinese arbitral body would perform as venal as are the Chinese “courts”. Hence their faith in receiving a “home town decision” if the arbitration were to be heard in China. They could not conceive of

the notion that a foreign party could win an award against them in “their own back yard”. In reality, arbitration awards in China are often fair and impartial. But the contrary perception on the part of Chinese partners typically causes them to adopt a totally rigid stance, telling the foreign party to “take it or leave it”, if the contract calls for Chinese arbitration. Hence, the chances of a friendly and reasonable compromise, obviating the need for arbitration, are greatly diminished.

The second irony is that it is easier to enforce a foreign arbitration award in China than it is to enforce a Chinese award. This appears incomprehensible on its face, but it is nevertheless true. (Enforcement of all arbitration awards in China is difficult, but it is much more so with domestic awards.) This seemingly astounding reality arises from the fact that China is a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “New York Convention”).

Any arbitration award, whether domestic or foreign, must be enforced by a Chinese “court” of competent jurisdiction in the locality in which the defendant is resident. One of the primary functions of Chinese “courts” is the practice of what is known as “local protectionism”. Courts will characteristically safeguard the interests of powerful local economic entities, whether the opposite party be foreign or simply from another part of China. Consequently, the local “court” will simply “stonewall” any outside party seeking to enforce a Chinese arbitration award and the matter will

résultant du contrat. Entre un « tribunal » chinois et l’arbitrage, tous les coentrepreneurs étrangers ayant obtenu des conseils juridiques compétents insisteront sur l’insertion d’une clause d’arbitrage dans le contrat. Aucun investisseur étranger bien renseigné ne s’approchera volontairement d’un « tribunal » chinois...

Les « causes de soja », une série de causes entendues par les tribunaux maritimes de Chine entre 1997 et 2003, illustrent bien la « primauté du droit » telle qu’administrée par les « tribunaux » chinois. Toutes ces causes – des centaines – résultaient d’un seul incident international.

À la fin de 1997, les prix mondiaux du soja s’étaient effondrés. En quelques jours, le prix international de cette denrée avait chuté de 16 à 25% selon le pays d’origine, la couleur et le type de soja. À l’époque, un grand nombre d’entreprises import-export chinoises avaient acheté d’énormes quantités de farine de soja sur les marchés internationaux et des vaisseaux de différents pays transportaient le cargo en vrac vers la Chine.

Des centaines de vaisseaux chargés de farine de soja ont arrimé dans les ports chinois entre décembre 1997 et janvier 1998. Presque tous ont été mis en état d’arrestation à leur arrivée à la demande des propriétaires de la farine de soja.

Chacune de ces centaines de causes a abouti à un règlement en faveur des demandeurs chinois et dans toutes ces causes, les dommages-intérêts octroyés variaient entre 16 et 25% de la valeur du cargo. Et chaque jugement constituait une manne variant entre un et plusieurs millions de dollars US pour le plaignant chinois.

Le gouvernement chinois, les « tribunaux » et les importateurs avaient compris : pourquoi les entreprises chinoises devraient-elles subir des pertes sur les marchés internationaux quand une file ininterrompue de vaisseaux étrangers pourraient être arrêtés et transformés en citrons que l'on pouvait presser pour compenser les pertes...

Nous avons entendu une conversation entre les demandeurs chinois et leur avocat dans une chambre d'hôtel. Les représentants et représentantes de *China National Food, Cereals and Oils Import Export Corporation* parlaient du « financement de la cause ». L'un d'eux dit à l'avocat : « OK, 20 000 pour le juge, 20 000 pour l'expert maritime du CCCI, et 20 000 pour les entrepreneurs de manutention qui sélectionnent les échantillons de cargo pour l'expertise maritime du CCCI... »

La Chine a appris que pour la plupart des observateurs étrangers, l'apparence et la façade du processus judiciaire

languish there for years, or even decades, with no resolution. As a general rule, Chinese arbitration awards, though usually fair and impartial, are simply useless because no Chinese "court" will enforce them except in extraordinary circumstances.

The Chinese "courts" will of course attempt the same approach when confronted with a foreign arbitration award. And they do often delay execution for years. Because China is a signatory to the New York Convention, however, the applicant may be able to bring its own government on board for purposes of pressuring the Chinese government to ensure that Chinese "courts", at least in these narrow circumstances, act in accordance with law.

In the context of contractual disputes, therefore, the foreign joint venture partner has a modicum of control over the inherent and blatant unfairness and inequality he faces in any dispute with his Chinese partner. And if the foreign investor has opted to go the route of the Wholly Foreign Owned Enterprise ("WFOE"), then of course the problem of contractual disputes with Chinese partners does not arise.

But what is the situation in the event that the dispute arises in tort? Or under contracts for services or supplies?

This is one of the most timely and acutely important questions which foreign investors in China need to address at the present time. Yet it is a question which has never been

addressed to date, to the best of my knowledge. Why should this be? The answer would appear to be two-fold.

First, the Canadian business community is continuously assured by Paul Martin that the Chinese Government is seriously committed to implementing the "Rule of Law", that tremendous progress has been made on that front, and that the Chinese "judicial" system is making progress.

Second, very few foreign investors have yet had the unfortunate experience of appearing as defendants in a Chinese "court". Probably fewer yet have chosen to enter a Chinese "court" as a plaintiff seeking redress against a Chinese entity.

Let us address each of these factors in sequence.

### PM Paul Martin's China Fantasy

With respect to the first point, Canadian Prime Minister Paul Martin is doing his business constituents a serious disservice by perpetuating a picture which has no basis whatsoever in fact. (To be fair, many other leaders of Western democracies are guilty of doing the same thing.) Far from being committed to implementation of the "Rule of Law", the Chinese Government is in reality fundamentally, absolutely, and irrevocably committed to preventing the Rule of Law at whatever cost necessary. Their rationale is not difficult to fathom. China now is governed by the Communist Party's absolute and untrammelled

monopoly of power at all levels. This includes the “judicial system”. It is totally impossible for any Chinese “court” to override any act or policy of the Party. Party and Government leaders regularly and routinely instruct judges at the Supreme Court level on the judgment they shall give in any case affecting the Party or Government. “Courts” are simply very low level administrative organs of the Chinese Communist Party.

The Rule of Law, if ever implemented in China, would quite simply end the total dictatorship of the Party and destroy its monopoly of power. Many aspects of contemporary China are complex and difficult to analyze or understand; this is not one of those aspects. The Chinese Government/Party has made it abundantly clear in a myriad ways that it will brook no threat to or limitation on its power and it ruthlessly crushes any person or organization which publicly questions the legitimacy of the government or even the legitimacy of a particular law or policy. Neither in law, nor in practice, is there a shred of independence in the Chinese “judiciary”. That issue will be explained elsewhere.

Turning to the second point, why is it that foreign investors have to this point almost never found themselves before a Chinese “court” and why is that situation likely to change markedly in the near future?

### Extortion of Foreigners by Chinese Maritime “Courts”

At least 95% (and possibly 99%) of all Chinese litigation involving a

foreign party has up to now taken place in the Chinese Maritime “Courts”. The reason for this is that foreign shipowners do not have the luxury of relying on foreign jurisdiction clauses, as do foreign investors. The mechanism through which a foreign shipowner finds itself in the grasp of the Chinese Maritime “Court” is that of an arrest by a Chinese cargo owner. The Chinese party arrests the vessel, then files a claim with the local “court” and demands a substantial bank guarantee, usually naming the “court” as beneficiary, as a condition precedent for lifting the arrest order and allowing the vessel to sail. The shipowner is in no position to politely decline the jurisdiction of the Chinese “court” in favour of foreign arbitration.

Theoretically, the position of the shipowner should not differ in any respect from that of the foreign investor negotiating a joint venture contract. Of course, if the claim arises in tort as a result of a collision, allision, grounding, oil spill, etc., then there is no relevant contract and jurisdiction clauses do not arise. But the overwhelming majority of Chinese claims against the owners of foreign vessels in fact are cargo claims arising under a contract for the carriage of goods by sea. Such contracts are evidenced in bills of lading which in the overwhelming majority of cases contain foreign jurisdiction clauses. The majority of those clauses call for arbitration in foreign countries, though some specify the jurisdiction of a foreign court.

sont plus importants que la substance. Révélant l'époque où les « juges » portaient les uniformes militaires bleus et où le tribunal siégeait dans un appartement miteux d'un immeuble d'habitation. Maintenant le « tribunal » ressemble extérieurement à un vrai tribunal. Les « juges » siègent à l'avant du tribunal et portent des toges noires, comme de vrais juges. Des avocats et avocates représentent chacune des parties. Des témoins sont interrogés et contre-interrogés. Le « procès » se poursuit dans la solennité et l'on peut pardonner à un observateur de croire que les « juges » évaluent vraiment la preuve. Mais dans cette dernière cause me concernant, devant le tribunal maritime de Guangzhou, il n'existait même pas un semblant de traitement équitable.

C'est la seule cause que j'aie vue, même en Chine, qui ait commencé par la défense. Il y avait deux plaignants et chacun avait un avocat. Invités par le président du « tribunal » à présenter leur preuve, chacun a refusé, se disant satisfait de la déclaration déposée au moment d'entreprendre la poursuite. Pendant deux jours, nous avons présenté la preuve de quatre experts dont deux des plus éminents spécialistes de la Chine. Le troisième était de Hong Kong, le quatrième de la Hollande.

Aucun des trois « juges » n'a pris de notes pendant le

témoignage de nos experts, expertes. Un juge a passé la première journée à regarder par la fenêtre, s'étirant à l'occasion pour voir ce qui se passait dans l'immeuble voisin. Le deuxième jour, il nous faisait face mais a lu des journaux pendant toute la durée de l'audience. Entretiens, le président du tribunal basculait dans son fauteuil inclinable en bâillant, ou se penchait pour jouer avec son téléphone cellulaire. Le troisième juge a démontré un certain intérêt, a même posé quelques questions, mais n'a pris aucune note.

Quand nous avons demandé à l'avocat d'un des plaignants (une compagnie d'assurances) de produire la preuve documentaire d'un paiement en vertu de la police d'assurances, l'avocat était abasourdi. Il ne pouvait produire ni chèque oblitéré ni autre preuve documentaire d'une transaction avec paiement. Le plaignant n'a jamais produit cette preuve mais trois ou quatre semaines plus tard, le « tribunal », sans surprise, a rendu un « jugement » en faveur des plaignants, leur accordant le plein montant de la réclamation.

*Clive M. Ansley, LL.B., 1980 (U. Windsor), LL.M., 1981 (University College London) fut pendant longtemps associé résidant à Shanghai du cabinet Bull, Housser & Tupper avant de rejoindre le cabinet londonien de Holman Fenwick & Willan en mai 2001. Il a exercé le droit*

Chinese black letter law specifically requires the "courts" to recognize and give effect to foreign jurisdiction clauses in bills of lading. Moreover, there are several publicized directives from the Supreme Court of China to all the Maritime "Courts" throughout the country, emphasizing that unless there is a lack of reciprocity in a specific case (*i.e.* the country specified in the bill of lading would not recognize a Chinese jurisdiction clause in a Chinese bill of lading), the maritime "courts" should always give effect to a foreign jurisdiction clause which is included on the face of the bill, is clearly drafted, and which names a specific arbitration body or court. So there should be no problem.

There is a problem. The problem is that Chinese "courts" and "judges" for the most part pay no attention to the law and often do not even consult it in the course of the judgment process. Nowhere is this more patent than in the Maritime "Courts" treatment of foreign jurisdiction clauses. The law, and the directives of the Supreme Court, dictate that such clauses should almost always be honoured; the Maritime "Courts" *never* honour foreign jurisdiction clauses and they assume jurisdiction in *all* cases. In a subsequent Practice Note, I shall examine the creative, bizarre, and totally dishonest rationales usually put forward by the Maritime "courts" as reasons for their routine dismissal of any foreign defendant's application for a stay of proceedings on the basis of a foreign jurisdiction clause.

Having assumed jurisdiction for bogus reasons, and contrary to Chinese law, the Maritime "Courts" proceed inexorably in virtually 100% of cases to judgment in favour of the Chinese plaintiff, irrespective of what expert evidence and argument may be adduced on behalf of the foreign defendant. In a huge percentage of these cases, the claims are completely fraudulent and constitute an organized mechanism, with the collusion of the "courts", for extorting huge sums from the foreign shipping community in order to recover trading losses incurred on the world commodity market. I shall provide examples of this at a later point. Those claims which are not totally devoid of legitimacy are almost always grossly inflated. Yet the "courts" usually give judgment in the full amount of the plaintiff's claim.

### Risk of Chinese "Courts" Imminent Reality for Foreign Investors

Why have foreign investors fared so much better than foreign ship-owners? And why is the situation likely to change, with foreign investors experiencing the same "judicial" outrages so familiar for so long to the foreign shipping community? It is Chinese policy to treat Foreign Direct Investment ("FDI") with "kid gloves". China is totally unconcerned and uninfluenced by foreign attempts to force reforms, (whether in the area of human rights or legal reform or other areas), with only one exception. China's Achilles Heel is any threat to the continuous flow of FDI. Any bad press which could

turn foreign investors away from China as a target jurisdiction for FDI causes great concern within the Beijing leadership.

Foreign ships will continue to carry the world's produce to China regardless of how regularly they are fleeced by Chinese "courts"; at least for the foreseeable future, the losses will be reflected only in ever increasing insurance premiums borne by the international shipping community. Foreign investors are completely unaware of what happens to foreign shipowners in China, and if they were aware it is doubtful that they would care. If foreign arbitration clauses in Sino-Foreign joint venture contracts were to be routinely over-ridden by Chinese "courts" and the foreign parties then routinely separated from their cash and equipment, for the benefit of their Chinese partners, that would be a different matter. It would not take long for the flow of FDI to dry up.

However, many foreign joint venturers and WFOE's have been established in China now for twenty or more years. All these companies are Chinese corporate citizens and they cannot opt for foreign jurisdiction when their Chinese company enters into a contract with another Chinese company, for supplies and services, for marketing of products, for distribution, etc. Any dispute under such contracts will ultimately and inevitably be subject to the jurisdiction of the Chinese "courts".

Moreover, it will be increasingly common for foreign parties to be hauled into "court" to face actions

in tort, rather than contract. Truck drivers employed by foreign corporations will inevitably be involved in accidents resulting in property damage to third parties or in personal injury and even death. Exploding or otherwise defective products will bring similar claims, on the basis of product liability. The Chinese government will likely calculate, probably correctly, that victimization on the basis of such claims, which are extrinsic to the investments themselves, are unlikely to discourage the flow of FDI.

As foreign manufacturers operate in China for longer periods of time, that time period alone will inevitably result in an ever increasing flow of litigation against them. Moreover, Chinese society is rapidly becoming litigious. And a wide range of dishonest claimants will become increasingly aware of the huge largesse that cargo owners have amassed in partnership with the Maritime "courts" through the extortion of the foreign shipping community.

### Legal Extortion on a Grand Scale: The Great Soybean Scam by the Chinese "Judiciary"

Perhaps the most massive illustration of the "Rule of Law" as administered by Chinese "courts" is that of the "Soybean Cases", a long line of cases which wound their way through the Chinese Maritime "Courts" from the end of 1997 until 2003, and perhaps later. All these cases, numbering in the hundreds, stemmed from a single international event.

*pendant 14 ans à Shanghai et cinq années à Taipei.*

*Spécialiste de la Chine et des relations sino-canadiennes depuis plus de 40 ans, Me Ansley parle et lit le chinois. Il est diplômé en études chinoises d'universités canadiennes et titulaire d'un diplôme d'études supérieures en droit chinois de l'University of London (School of Oriental and African Studies).*

*Ancien professeur canadien d'histoire, de civilisation et de droit chinois, Me Ansley a enseigné le droit chinois à l'University of Windsor et à l'University of British Columbia. Il a aussi enseigné à la faculté de droit de l'université Fudan (à Shanghai) en 1984 et détient toujours le titre de professeur adjoint à cette université. Plus récemment, il a enseigné le droit économique international à l'Université Jiaotong de Shanghai. Me Ansley a étudié le nouveau système de justice chinois depuis ses débuts en 1979; il a publié et enseigné le droit chinois, et a comparu devant plusieurs tribunaux étrangers à titre d'expert reconnu en droit chinois.*

*Me Ansley a établi le premier bureau juridique étranger à Shanghai en 1985, qu'il a dirigé jusqu'à 1989 quand le cabinet Bull, Houser l'a réaffecté à son bureau de Hong Kong, puis au bureau de Taipei. Il est revenu à Shanghai à l'été 1994 pour y représenter le cabinet, ce qu'il a fait jusqu'à la fin de mai 2003. Il connaît bien les lois chinoises relatives à l'établissement en Chine de coentreprises et de filiales en propriété exclusive.*

*Au fil des ans, en plus de représenter des entreprises et des clients*

*commerciaux, il a plaidé plus de 300 causes en Chine. Ses clients et clientes proviennent de plusieurs pays, y compris le Canada, les États-Unis, la Grande-Bretagne, l'Allemagne, la Norvège, la Suède, le Japon, Hong Kong et Taiwan. En avril 2003, Me Ansley s'est joint à Arvay Finlay, un éminent cabinet canadien spécialisé en litige et reconnu pour des victoires marquantes dans des causes de droits de la personne. Il exerce maintenant le droit sous le titre d'Ansley & Company. Courriel : cmansley@island.net*

At the end of 1997, the bottom dropped out of the world price of soybean meal. Within a matter of days, the international price of this commodity dropped by between 16% and 25%, depending upon the country of origin, the colour, and the type of soybean. At that time, a number of large Chinese import/export companies had purchased huge quantities of soybean meal internationally and their purchases were now in transit to China as bulk cargoes being carried by many foreign vessels. The cargoes were shipped from the USA, from South America, from India, and from several countries in Southeast Asia. They were all in transit at the time the market fell.

Hundreds of ships carrying soybean meal arrived at Chinese ports in December 1997 and January of 1998. Virtually all were arrested immediately upon arrival, by the Chinese cargo owners. The latter filed claims alleging "wet damage", damage from improper ventilation, and contamination of cargo. Fre-

quently, allegations were also made that moisture content, fat content, ash content, and silica content exceeded contractual limits. All cargoes were surveyed by the China Commodities Inspection Bureau ("CCIB"), and this notoriously corrupt body uniformly produced survey reports upholding the claims of the Chinese cargo owners.

In the innumerable trials which followed, incontrovertible evidence of the top Chinese and foreign authorities in the relevant disciplines, was repeatedly introduced, proving conclusively that the CCIB reports were not only fraudulent, but in many cases their conclusions were actually scientifically impossible. However, Chinese Maritime "Courts" uniformly take the position that Chinese law requires them to accept the reports of CCIB. Foreign survey reports, or reports paid for by foreign defendants but carried out by other Chinese licensed surveyors are often put in evidence, but the "court" invariably says that it is bound by Chinese law to treat the CCIB report as conclusive. This is completely untrue and there is nothing in any Chinese statute to support the statement, but it is the position adopted by every Maritime "Court" in China.

In the end, every single one of these several hundred cases ended in a judgment for the Chinese claimant and in all cases the damages assessed ranged from 16% to 25% of the value of the cargo. Each judgment constituted a windfall for the Chinese claimant ranging from one to several million US dollars.

The large Chinese import/export corporations which had purchased the commodity on the world market and then incurred instant and substantial losses all had downstream sales contracts with end users of the soybean meal. When the world market price went south, the end users all walked away from their contracts with the importers, pointing out that they could now purchase the product at a substantially reduced price. But the Chinese government, "courts", and importers realized that there was no reason why Chinese corporations should have to suffer losses while trading in the international market place, when there was an endless queue of foreign vessels just waiting to be arrested and turned into "cash cows" which could be squeezed to make up for the losses.

We handled many of these cases on behalf of foreign insurers. In my next Practice Notes, I shall provide a number of actual experiences with Chinese "courts" while litigating not only the "soybean cases", but a wide variety of others as well. For now, I shall end with vignettes from my first soybean case and my last.

### Comments on Two Soybean Cases

In the first case, which is well worth examining in its entirety later on, we had a rare experience right after the vessel had been arrested. We heard a conversation between the Chinese claimants and their lawyer, which took place in their hotel room. (I shall not take time here to explain, but we did not commit an ethical breach by listening). The representatives of the China National

Foods, Cereals, and Oils Import Export Corporation were addressing the problem of "financing the case". Said one of them to their lawyer, "OK, 20,000 for the judge, 20,000 for the CCIB surveyor, and 20,000 for the stevedores who select the cargo samples for CCIB to survey." The irony is that the presiding judge whom they were preparing to pay need not have been bought. He was indeed one of the most corrupt judges in the Shanghai Maritime "Court", but in a case such as this he could not decide the outcome in any event. It would have to go to the invisible "Judicial Committee" in the back room and the party representative would decide how much the Chinese importer would receive. So, ironically, they were preparing to bribe the judge for something which he actually did not have the power to deliver!

The last case I handled before I left China at the end of May, 2003 was a classic. China has learned that the appearance and trappings of judicial process are more important than the substance, for most foreign observers. Gone are the days when "judges" wore blue military uniforms and when the "court" was a dingy apartment in a tenement building. Now the "court" looks to all outward appearances just like a real court. "Judges" sit on a raised bench at the front and wear black robes, just like real judges. There are lawyers for each party; witnesses are called and cross-examined. And for the most part, the "trial" is solemnly conducted and an observer may be forgiven for thinking that the "judges" are actually absorbing the evidence. But in this last case of

mine, in the Guangzhou Maritime "Court", no one even bothered with a pretence of due process.

This is the only case I have experienced, even in China, which opened with the defence. There were two claimants and each had a lawyer. Asked by the presiding "judge" if they would like to call evidence, each declined, stating that they were content to rely on the Statement of Claim they had filed to initiate the lawsuit. We then presented evidence from four experts over a period of two days. Two of these were the two most qualified men in their fields in all of China, one was from Hong Kong, and the fourth had been brought from Holland.

Not one of the three "judges" took a single note while the expert evidence was being tendered over two days. One judge spent the first day turned sideways in his chair, looking out the window and constantly craning his neck in an apparent attempt to take in some occurrence unfolding in the window of an adjacent building. On the second day, he faced forward and read newspapers throughout the proceedings. Meanwhile, the presiding judge alternately tilted far back in his reclining chair with his mouth wide open in a perpetual yawn, and leaned forward to play with his cell phone. The third judge actually showed some interest in the proceedings from time to time and asked a few questions. But, as noted, even he took no notes.

When we later asked the lawyer for one of the plaintiffs (an insurance company) to produce documen-

tary evidence that the company had ever paid out under the policy, the lawyer was astounded. He could not produce a cancelled cheque or documentary evidence of any kind proving any bank transaction involving payment. The claimant never did produce this evidence, but within three or four weeks the "court", to the surprise of no one, handed down "judgment" for the claimants in the full amount of their claim.

It was time for me to leave China.

## ENDNOTES

\* *Clive M. Ansley, LL.B., 1980 (U. Windsor), LL.M., 1981 (University College London), was Bull, Housser & Tupper's long time Resident Partner in Shanghai until joining the London firm of Holman Fenwick & Willan in May of 2001. He practised for a total of fourteen years in Shanghai, and five years in Taipei.*

*Mr. Ansley has been actively involved with China and Sino-Canadian relations for more than forty years. He speaks and reads Chinese and holds both undergraduate and graduate degrees in Chinese Studies from Canadian universities, as well as a graduate degree in Chinese Law from the School of Oriental and African Studies, University of London.*

*A former Canadian professor of Chinese History, Civilization, and Law, Mr. Ansley taught Chinese Law for six years at the University of Windsor and the University of British Columbia. He also taught in the Law Faculty of Shanghai's Fudan University in 1984 and still holds the title of Advising Professor at that institution. More recently, he taught International Economic Law at Shanghai's Jiaotong University. Mr. Ansley has studied the new Chinese legal system since its inception in 1979, has published and lectured extensively on Chinese Law, and has appeared in a number of foreign court and tribunal proceedings as a recognized expert on Chinese law.*

*Mr. Ansley established the first foreign law office in Shanghai in 1985 and ran that office until 1989 when he was re-assigned first to Bull, Housser's Hong Kong office, and then to its Taipei office. He returned to represent the firm in Shanghai once more in the summer of 1994 and practised in Shanghai from that time until the end of May, 2003. He is fully familiar with*



*a wide range of Chinese law relating to the establishment of Sino-Foreign joint ventures and wholly owned subsidiaries in China.*

*Over the years, in addition to representing corporate and commercial clients, he has litigated more than 300 cases in China. His clients have come not only from Canada and the U.S., but also from Britain, Germany, Norway, Sweden, Japan, Hong Kong, and Taiwan.*

*In April of 2003, Mr. Ansley joined Arvay Finlay, a prominent Canadian litigation firm renowned for its landmark victories in a number of human rights cases, but now practises as Ansley & Company. E-mail: cmansley@island.net*

<sup>1</sup> Still commonly known by this name, but also known now as the Foreign Economic and Trade Arbitration Committee ("FETAC").